

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of:)	
)	
Family Stations, Inc.)	
)	CSR-5772-M
v.)	
)	
DirecTV, Inc.)	
)	
Request for Mandatory Carriage of)	
Television Station WFME-TV,)	
West Milford, New Jersey)	

MEMORANDUM OPINION AND ORDER

Adopted: February 11, 2002

Released: February 14, 2002

By the Deputy Chief, Cable Services Bureau:

I. INTRODUCTION

1. Family Stations, Inc. ("Family") licensee of noncommercial, educational station WFME-TV, West Milford, New Jersey ("WFME" or the "Station") filed the above-captioned must carry complaint against DirecTV, Inc. ("DirecTV"), pursuant to Section 338 of the Communications Act, as amended (the "Act"), and Section 76.66 of the Commission's rules¹ for its refusal to carry the signal of WFME on its satellite system.² WFME states that DirecTV is providing "local-into-local" satellite service in New York, the designated market area ("DMA") where station WFME operates, pursuant to the statutory copyright license.³ In its complaint, WFME alleges that DirecTV has failed to meet its must carry obligations under the Commission's satellite broadcast signal carriage rules. WFME requests that the Commission order DirecTV to carry the station's signal on DirecTV's satellite system. DirecTV filed a Motion for Summary Dismissal and Answer ("Answer") to which Family replied.⁴

¹ 47 U.S.C. § 338; 47 C.F.R. § 76.66. We note that on December 7, 2001, the U.S. Court of Appeals for the Fourth Circuit unanimously upheld the constitutionality of Section 338 of the Act, and Section 76.66 of the Commission's rules. *See SBCA v FCC*, Nos. 01-1151, 01-1271, 01-1272 and 01-1818, 2001 WL 1557809 (4th Cir. Dec. 7, 2001).

² The Commission issued a Public Notice on October 15, 2001. Cable Special Relief and Show Cause Petitions, Report No. 0016 (released October 15, 2001).

³ *See* 17 U.S.C. § 122(a); 47 U.S.C. § 339. A satellite provider provides "local-into-local" satellite service when it retransmits a local television signal back into the local market of that television station for reception by subscribers. 47 C.F.R. § 76.66(a)(6).

⁴ Under Section 76.66(m)(3) of the Commission's rules, a local television broadcast station that disputes a

(continued...)

II. BACKGROUND

2. Section 338 of the Act, adopted as part of the Satellite Home Viewer Improvement Act of 1999 (“SHVIA”),⁵ requires satellite carriers, by January 1, 2002, to carry on request all local television broadcast stations’ signals in local markets in which the satellite carrier carries at least one local television broadcast signal pursuant to the statutory copyright license.⁶ For the initial election cycle, broadcast stations were required to notify satellite carriers by July 1, 2001, of their mandatory carriage election for carriage to commence by January 1, 2002.⁷ A station’s market for satellite carriage purposes is its DMA, as defined by Nielsen Media Research.⁸ In November 2000, the Commission adopted rules to implement the provisions contained in Section 338.⁹

3. Whenever a local television broadcast station believes that a satellite carrier has failed to meet its obligations under Section 338 of the Act or our implementing regulations, such station shall first notify the carrier, in writing, of the alleged failure and identify its reasons for believing that the satellite carrier has failed to comply with its obligations.¹⁰ Within 30 days after such written notification, the

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response by a satellite carrier that it is in compliance with its must carry obligations may obtain review of such denial or response by filing a “complaint” with the Commission in accordance with Section 76.7. *See* 47 C.F.R. § 76.66(m)(3). Although styled a “complaint,” a carriage complaint filed against a satellite carrier is treated by the Commission as a petition for special relief for purposes of the Commission’s pleading requirements. *See 1998 Biennial Regulatory Review: Part 76 – Cable Television Service Pleading and Complaint Rules*, 14 FCC Rcd 418 (1999). Responsive pleadings filed in this context, therefore, must comply with the requirements set forth in Section 76.7(b)(1). DirecTV also sent a letter to the Cable Services Bureau Chief addressing issues raised in a letter sent to Congress by WFME’s counsel regarding a hearing on Multi-Channel Video Competition. (*See* December 12, 2001 Letter to W. Kenneth Ferree, Chief, Cable Services Bureau from Gary Epstein, Esq. and James Barker, Esq.). WFME responded by arguing that DirecTV’s letter is an unauthorized pleading because the WFME letter referenced by DirecTV was sent to Congress and should not be made part of the record in the instant must carry proceeding. (*See* December 14, 2001 Letter to W. Kenneth Ferree, Chief, from Peter Tannenwald, Esq.). We agree and will not incorporate the letter as part of this proceeding.

⁵ *See* Pub. L. No. 106-113, 113 Stat. 1501, 1501A-526 to 1501A-545 (Nov. 29, 1999).

⁶ *See* 47 U.S.C. § 338.

⁷ *See* 47 C.F.R. § 76.66(c)(5), which states that a noncommercial television station must request carriage by July 1, 2001 for the first election cycle and must renew its carriage request at the same time a commercial television station must make its retransmission consent-mandatory carriage election for all subsequent cycles.

⁸ A DMA is a geographic area that describes each television market exclusive of others, based on measured viewing patterns. *See* 17 U.S.C. § 122(j)(2)(A)-(C); *see also Implementation of the Satellite Home Viewer Improvement Act of 1999: Broadband Signal Carriage Issues; Retransmission Consent Issues*, 16 FCC Rcd 1918, 1934 (2000)(“DBS Must Carry Report & Order”); 47 C.F.R. § 76.66(e)(“A local market in the case of both commercial and noncommercial television station is the designated market area in which a station is located, and (i) in the case of a commercial television broadcast station, all commercial television broadcast stations licensed to a community within the same designated market area within the same local market; and (ii) in the case of noncommercial educational television broadcast station, the market includes any station that is licensed to a community within the same designated market area as the noncommercial educational television broadcast station.”).

⁹ *See generally DBS Must Carry Report & Order*, 16 FCC Rcd at 1918 *et seq.* The Commission later affirmed and clarified its carriage rules. *See Implementation of the Satellite Home Viewer Improvement Act of 1999; Broadcast Signal Carriage Issues*, 16 FCC Rcd 16544 (2001)(“DBS Must Carry Reconsideration Order”).

¹⁰ *See* 47 U.S.C. § 338(f)(1); *see also* 47 C.F.R. § 76.66(m)(1).

satellite carrier must respond in writing and comply with its obligations or state its reasons for believing that it is already doing so.¹¹ If Commission action is necessitated, as WFME alleges here, a broadcast station may file a complaint with the Commission within 60 days after the satellite carrier submits a final rejection of the broadcast station's carriage request.¹² If a satellite carrier provides no response to a must carry election, the 60-day period commences after the time for responding as required by the rule has elapsed.¹³ Below, we consider the complaint filed by Station WFME.

III. DISCUSSION

4. In support of its Complaint, Station WFME states that it is an independent, full-power, noncommercial television station that broadcasts primarily religious and public affairs programming, and that it is licensed to West Milford, New Jersey, which is in the New York DMA.¹⁴ WFME asserts that on June 28, 2001, its counsel sent on its behalf a certified letter, return receipt requested, to DirecTV requesting mandatory carriage of WFME on DirecTV's system serving the New York DMA.¹⁵ In support, WFME submits an unsigned letter dated June 28, 2001, printed from counsel's computer, with a Declaration from WFME's counsel who states that he drafted and executed the letter and instructed his administrative assistant to mail the letter to DirecTV via U.S. certified mail, return receipt requested.¹⁶ WFME also submits a Declaration from the administrative assistant who states that the letter was addressed to DirecTV and mailed via certified mail, return receipt requested, but that the letter and documentation for the return receipt were inadvertently lost.¹⁷ WFME asserts further that DirecTV failed to respond by July 30, 2001. WFME contends that DirecTV's failure to respond is considered a refusal of its must carry request.¹⁸ WFME notes that following denial of carriage, a broadcaster has 60 days in which to file a complaint.¹⁹ WFME states that it had until September 28, 2001 to file a complaint and its

¹¹ See 47 C.F.R. § 76.66(m)(2).

¹² See 47 C.F.R. § 76.66(m)(6); *DBS Must Carry Reconsideration Order*, 16 FCC Rcd 16544, at ¶ 60. If a television station seeks a finding on the facts and a resulting determination of whether it is entitled to carriage pursuant to Section 76.66 of our rules, then it may file a complaint with the Commission. If, however, a television station is not being carried and seeks damages and other specific forms of monetary or injunctive relief under either Section 338(a) of the Act or Section 501(f) of the Copyright Act, then the United States District Court is the exclusive forum for adjudicating the complaint. *DBS Must Carry Report & Order*, 16 FCC Rcd at 1974.

¹³ See *DBS Must Carry Reconsideration Order*, 16 FCC Rcd at 16574.

¹⁴ Complaint at 1.

¹⁵ *Id.* at 1-2, Exhibit I.

¹⁶ Complaint at 1, n. 1 and Exhibit I.

¹⁷ *Id.*

¹⁸ Complaint at 2, citing the *DBS Must Carry Report & Order*, where the Commission stated that "the denial can be in the affirmative, as in a rejection letter, or by silence, where a carrier does not respond to a carriage request within 30 days of its receipt." 16 FCC Rcd at 1975. WFME notes that according to Section 76.66(m)(2) of the Commission's rules, a satellite carrier has 30 days to respond in writing to the notification of a full-power television station that it is either electing between mandatory carriage or retransmission consent or, in the case of noncommercial stations, requesting carriage. WFME asserts that the rule differs from the *DBS Must Carry Report & Order* in that the latter allowed satellite carriers until August 1, 2001 to respond to television station notifications in the first election cycle. Complaint at 3, n. 6. See *DBS Must Carry Report & Order*, 16 FCC Rcd at 1931-1932.

¹⁹ Complaint at 3, citing 47 C.F.R. § 76.7(c)(5). See also *DBS Must Carry Report & Order*, 16 FCC Rcd at 1975.

complaint is therefore timely filed.²⁰

5. WFME argues that DirecTV is obligated to carry the WFME signal and that grant of WFME's request for carriage would serve the public interest by helping to create a more diverse competitive communications landscape.²¹ WFME states that each satellite carrier providing local-into-local service is obligated to carry every local noncommercial television station in the particular DMA, unless the station's programming is duplicative of the programming of another noncommercial station carried in the DMA.²² WFME asserts that DirecTV must carry the station because no other noncommercial station in the New York DMA duplicates WFME's programming.²³

6. With regard to signal quality, WFME asserts that it is confident that it does provide a good quality signal to DirecTV pursuant to the Commission's rules.²⁴ WFME also states that if, for any reason, the signal of WFME does not meet the Commission's signal quality requirements, WFME pledges to provide DirecTV's local receive facility in the New York DMA with a good quality signal at its sole expense.²⁵

7. In its answer, DirecTV contends that the Commission lacks jurisdiction to resolve satellite must carry complaints and maintains that such disputes can only be brought in federal district court.²⁶ In support, DirecTV argues that pursuant to Section 338(a)(2), the forum to redress any failure to meet a carrier's carriage obligations is federal court.²⁷ DirecTV argues further that the Commission cannot consider WFME's must carry complaint because the instant case does not involve the issues of good signal quality, substantial duplication, channel positioning or compensation, which are areas over which the Commission has primary jurisdiction.²⁸ Therefore, according to DirecTV, the Commission must summarily dismiss the instant complaint.²⁹

8. DirecTV also argues that WFME is not entitled to carriage rights on the DirecTV system at issue because WFME failed to make a proper must carry request by July 1, 2001.³⁰ DirecTV asserts that although WFME states that it mailed its mandatory carriage request by certified mail, DirecTV has no record of receipt of such a letter.³¹ According to DirecTV, WFME has been unable to provide any documentary proof that the letter was mailed to and received by DirecTV, and instead claimed that the administrative assistant who mailed the carriage request failed to retain a copy of the request or the

²⁰ WFME notes that it arguably had until 60 days after August 1, 2001 to file its complaint. *See* n. 18, *supra*.

²¹ Complaint at 3-4.

²² *Id.* at 3, citing the *DBS Must Carry Order & Report*, 16 FCC Rcd at 1926.

²³ Complaint at 4, citing the *DBS Must Carry Order & Report*, 16 FCC Rcd at 1927.

²⁴ *Id.* *See* 47 C.F.R. § 76.55(c)(3). WFME asserts that it "places at least a 60 dBu contour over Manhattan." Complaint at 4.

²⁵ *Id.* at 4-5.

²⁶ Answer at 2-4.

²⁷ *Id.*

²⁸ *Id.* at 3-4.

²⁹ *Id.* at 4

³⁰ *Id.*

³¹ *Id.* at 5.

certified mail receipt.³² DirecTV notes that it established a process to make sure that all the must carry requests it received were catalogued and evaluated so that they were responded to promptly and correctly.³³ DirecTV maintains that out of hundreds of mandatory carriage election notices it processed, this is one of only three disputes concerning the record of receipt of a carriage request.³⁴ DirecTV notes that under Commission precedent must carry election deadlines are strictly enforced. In that regard, DirecTV contends that the Bureau's conclusion in *Gannon University Broadcasting, Inc.* ("*Gannon*") should govern the dispute here.³⁵ DirecTV states that in *Gannon*, the Bureau concluded that the rules and process in connection with making a carriage election, including the requirement that notifications be sent to the carrier by a date certain via certified mail, were specifically designed to provide certainty and avoid embroiling the Commission in notification disputes.³⁶ Accordingly, DirecTV argues that in the absence of any evidence that WFME properly and timely submitted its must carry request to DirecTV, WFME's complaint should be denied.³⁷

9. In reply, WFME argues that it has met its burden of proof that its must carry request was timely sent to DirecTV.³⁸ In support, WFME refers to an unsigned copy of the satellite carriage request it asserts was sent to DirecTV on June 28, 2001, via certified mail, return receipt requested.³⁹ WFME submits the Declaration of its counsel in which he states that he drafted the carriage request and delivered it to his administrative assistant, instructing her to sign the letter on his behalf and send it to DirecTV via certified mail, return receipt requested.⁴⁰ WFME's counsel maintains that this is standard office procedure, and asserts that to his knowledge such standard was followed.⁴¹ In addition, WFME submits the Declaration of the administrative assistant's supervisor who states that the method used by counsel and his administrative assistant to send certified mail was standard office procedure for the law firm.⁴² The supervisor asserts that she witnessed the assistant sending certified mail to ensure that she followed standard office procedures when doing so.⁴³ WFME further argues that under the Commission's own rules, "service by mail is complete upon mailing."⁴⁴ WFME also argues that circumstantial evidence concerning usual office procedure can establish proof of mailing.⁴⁵

³² *Id.* at 4.

³³ *Id.*

³⁴ *Id.* at 4-5.

³⁵ *Id.* at 6-7; *Gannon*, 10 FCC Rcd 8619 (CSB 1995).

³⁶ Answer at 6-7, citing *Gannon*, 10 FCC Rcd 8619 (CSB 1995).

³⁷ Answer at 9-10.

³⁸ Reply at 2.

³⁹ *Id.*, citing Complaint at 1, Exhibit 1.

⁴⁰ Reply at 3, Exhibit A.

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.*

⁴⁴ Reply at 3; *see* 47 C.F.R. § 1.47(f).

⁴⁵ Reply at 3-4, citing *United States v. Bowman*, 783 F.2d 1192, 1197 (5th Cir. 1986); *United States v. Ledesma*, 632 F.2d 670, 675 (7th Cir. 1980) ("Testimony as to office practice is sufficient proof of mailing."), *cert. denied*, 449 U.S. 998 (1980).

10. WFME also argues that even if DirecTV somehow failed to receive WFME's carriage request, DirecTV now is well aware of WFME's desire to be carried.⁴⁶ WFME further contends that DirecTV has not claimed that it would be harmed if it were required to carry WFME.⁴⁷ Additionally, WFME asserts that the carrier would not incur additional copyright fees by carrying WFME,⁴⁸ and DirecTV has not claimed that it lacks the capacity to carry WFME.⁴⁹ Further, WFME argues that Congress and the Commission never intended a satellite carrier to shirk its responsibilities based upon a technicality even if one exists, which WFME does not concede.⁵⁰ WFME contends that carriage should be denied only when the station does not meet its basic carriage qualifications.⁵¹

11. Based on the record, we deny WFME's complaint for mandatory carriage. As an initial matter, we note that we need not consider the jurisdictional issue raised by DirecTV given that it was considered and resolved by the Commission in the *DBS Must Carry Report & Order*.⁵² With regard to the substantive issues raised in WFME's complaint, the Commission made clear in the *DBS Must Carry Report & Order* that local stations are required to make their elections and requests for carriage, in writing, sent to the satellite carrier's principal place of business by certified mail, return receipt requested.⁵³ The Commission also stated that contacting a carrier by certified mail is the notification method required to ensure that broadcast stations are able to demonstrate that they submitted their elections by the required deadline, and that the satellite carrier received them.⁵⁴

12. WFME maintains that it sent DirecTV its must carry request by certified mail, return receipt requested. However, DirecTV has no record of ever receiving that request. Moreover, WFME provides no proof, such as a date-stamped certified mail receipt demonstrating that its must carry request was sent to DirecTV or a certified mail postal card evidencing that the letter was delivered to DirecTV. WFME instead argues that the standard mailing procedures at the law firm acting on its behalf should be accepted as proof that the mailing of the must carry request materials occurred. WFME submits declarations from the attorney who drafted the must carry request, the Director of Administration of the law firm and the administrative assistant asserting that standard office practice was followed when the must carry request at issue was purportedly mailed. In addition, although WFME argues that standard operating procedure is evidence of mailing, the cases WFME offers to support its assertion can be distinguished from the circumstances in the instant complaint. In the cases cited, the mailing of the documents at issue was accomplished by ordinary mail and there was no requirement that the materials be delivered via certified mail, return receipt requested.⁵⁵ It was under those circumstances that the court found that circumstantial evidence was sufficient to establish proof of mailing. Under the Commission's

⁴⁶ Reply at 5, 9.

⁴⁷ *Id.*

⁴⁸ See 17 U.S.C. § 122.

⁴⁹ Reply at 5, 9.

⁵⁰ *Id.* at 9.

⁵¹ *Id.*

⁵² *DBS Must Carry Report & Order*, 16 FCC Rcd at 1974; see also *supra* n. 12.

⁵³ *Id.*, 16 FCC Rcd at 1932.

⁵⁴ *DBS Must Carry Reconsideration Order*, 16 FCC Rcd at 16576.

⁵⁵ *United States v. Bowman*, 783 F.2d 1192 (5th Cir. 1986) and *United States v. Ledesma*, 632 F.2d 670 (7th Cir. 1980) are cases involving mail fraud.

rules applicable to this case, there is a specific requirement for mandatory carriage requests to be sent to the satellite carrier by certified mail, return receipt requested.⁵⁶ Standard office practice is not sufficient to adduce that mandatory carriage request documents were actually mailed to and received by the intended party. Without evidence of mailing, WFME's statement that its must carry request was sent certified mail and received by DirecTV is unsupported.

13. Requiring that notification be accomplished by certified mail provides assurances that satellite carriers are aware of their carriage obligations. Satellite carriers must contend with hundreds of elections and must carry requests from local stations, and configuring satellite systems requires some degree of certainty in order to enable satellite carriers to fulfill their obligations.⁵⁷ Satellite carriers should not be subject to election and carriage requests that fail to meet the requirements of the Commission's rules. This bright line approach in the Commission's rules was designed to avoid the particular types of arguments raised by WFME. Given WFME's failure to provide the proof required by the Commission's rules, we deem that it has not adequately established that its election was mailed or received. We believe that the *DBS Must Carry Report & Order* and the Commission's rules are clear with respect to the must carry request requirements.

IV. ORDERING CLAUSES

14. Accordingly, **IT IS ORDERED**, that DirecTV's Motion for Summary Dismissal **IS DENIED**.

15. Further, **IT IS ORDERED**, pursuant to Section 338 of the Communications Act, as amended (47 U.S.C. § 338), and Section 76.66 of the Commission's rules (47 C.F.R. § 76.66), that the must carry complaint filed by Family Stations, Inc., licensee of noncommercial station WFME-TV, Milford, New Jersey, against DirecTV, Inc. **IS DENIED**.

16. This action is taken by the Deputy Chief, Cable Services Bureau, pursuant to authority delegated by Section 0.321 of the Commission's rules.⁵⁸

FEDERAL COMMUNICATIONS COMMISSION

William H. Johnson
Deputy Chief, Cable Services Bureau

⁵⁶ See 47 C.F.R. § 76.66(d)(1)(ii).

⁵⁷ See *DBS Must Carry Report & Order*, 16 FCC Rcd at 1929.

⁵⁸ 47 C.F.R. § 0.321.